

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

FILED
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DISTRICT OF UTAH
DEPT. OF JUSTICE

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

vs.

STEPHEN W. BROCKBANK, et al.,

Defendants.

MEMORANDUM DECISION AND
ORDER ON OBJECTIONS TO
PROPOSED INTERIM
DISTRIBUTION PLANS AND
GRANTING PLAINTIFF'S MOTION
FOR INTERIM DISTRIBUTION
PLAN

Case No. 2:00-CV-622 TS

This matter came before the court on March 18, 2004, for hearing on the Plaintiff's Motion for Interim Distribution Plan and the Objections filed by Deanna Garrett and Patricia Kimsey.

I. INTRODUCTION

Immediately upon filing this case, the CFTC obtained an asset freeze of funds obtained from investors. The CFTC now moves to approve an Interim Plan of Distribution

237

of the frozen funds to investors on a pro rata basis. It has proposed, alternatively, the following: Fourth Plan of Distribution paying 56.02% on net claims; and Fifth Plan of distribution paying 62.17% on net claims. The CFTC is only recommending its Fifth Plan of Distribution. CFTC calculated the net claims by subtracting any amount of any distribution an investor received back prior to the asset freeze.

II. DEANNA GARRETT OBJECTION

Deanna Garrett is the wife of John Garrett, a defendant herein. John Garrett is one of the defendants who were added by a second case filed by the CFTC against defendants Gahma and Stephen Brockbank, which was later consolidated into this case. The CFTC obtained an asset freeze in both cases. The Garretts had a joint investment in Birma of \$100,000. The CFTC seeks to have the \$100,000 investment treated as John Garrett's investment and requests that any distribution on behalf of that account remain frozen to be available for Gahma investors if Mr. Garrett is found liable at trial.

Deanna Garrett objects and submits evidence that all of the \$100,000 invested was her separate property—an inheritance from the sale of her parents' house. Deanna Garrett argues that she has never co-mingled the inherited money with marital property, that under Utah law married women have property rights and that Utah law also provides that funds received by the parties during marriage from inheritance are separate, not marital, property. *See Burt v. Burt*, 799 P.2d 1166, 1169 (Utah Ct. App. 1990) (inherited property is separate from marital estate for divorce purposes).

Deanna Garrett and John Garrett have submitted affidavits saying that John Garrett has been a signatory on accounts where the money was held or invested only for convenience sake. The Customer Survey filled out by John Garrett responds to the question "under what name did you invest" with: "John V. Garrett & Deanna L. Garrett with Rights of Survivorship." (Ex. I).

The CFTC does not dispute that the \$100,000 was Deanna Garrett's separate inheritance. Instead, it contends that when the money was co-mingled with marital property by inclusion in jointly owned accounts, it thereafter became marital property. The CFTC relies on *Dunn v. Dunn*, 802 P.2d 1314, 1321 (Utah Ct. App. 1990)(separate premarital property may lose its separate distinction where parties have inextricably commingled it into the marital estate or contributed it to the marital estate). The CFTC submits information that the money was placed in Ms. Garrett's account where her husband was a signatory, then briefly moved to the Garretts' joint checking account to be wired to Birma and since then has been in a joint account in both of their names in Birma. The CFTC points out that it has evidence that John Garrett withdrew a large amount of cash (\$62,275.21) from yet another investment program (Vision Capital) involved with Gahma. (Ex. K). It argues the distribution based on the Garrett's joint account should be held in constructive trust and used for restitution to investors in that other fund. John Garrett's alleged cash withdrawal from the other program was in April 2002, two years after the Garretts' \$100,000 investment in Birma in April 2000.

The court finds that the *Dunn* and *Burt* cases are not controlling because this case does not deal with a division of marital property for the purposes of divorce. Instead, it is a question of ownership of funds in a joint account against third parties. Thus, the rule that the separate property of a married couple retains its status when converted from one investment medium to another so long as it remains readily traceable is helpful, but not controlling. *Burt*, 799 P.2d at 1169.

Instead, the court looks to the controlling Utah statute:

A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

Utah Code Ann. § 75-6-103(1) (quoted in *Maxfield v. Maxfield*, 856 P.2d 1056, 1057 (Utah 1993)).

The rule is different if only one name is on the account. See e.g. *Pochynok Co. v. Smedsrud*, 80 P.3d 563, 568 (Utah App. 2003)(garnishee and sole name on account must show by clear and convincing evidence that funds belong to someone else to rebut presumption under Utah law that funds in bank account belong to owner).

In the present case, the CFTC acknowledges that the \$100,000 was Deanna Garrett's separate property and that it is readily traceable through several accounts to the account with Birma. The Birma account, although held as a joint account with rights of survivorship, was entirely made up of the net contribution of Deanna Garrett of the entire sum on deposit from her separate property.

In seeking to impose a constructive trust on the funds for the creditors (the allegedly defrauded investors) of John Garrett, the CFTC is acting on behalf of those creditors. Another section of the Utah Code, Utah Code Ann. § 75-6-102, provides that section 75-6-103, is controlling as between the joint owners of a joint account and their creditors. These rules are not changed when the joint owners of the account are married. *Maxfield v. Maxfield*, 856 P.2d 1056, 1057 (Utah 1993). Therefore, under Utah Code Ann. § 75-6-103, Deanna Garrett is the owner of the entirety of funds in the Birma account and is entitled to have any distribution made in her name.

The CFTC argues that it is inequitable for John Garrett to be able to enjoy the benefit of a distribution of funds made to his wife. However, absent any tracing of the \$100,000 as originating from a person for whose behalf the funds should be held in trust, the record does not support a claim for imposing a constructive trust on Deanna Garrett's property for the benefit of persons allegedly defrauded by her husband. See *Tolman v. Winchester Hills Water Co., Inc.*, 912 P.2d 457, 462 (Utah App. 1996) ("A constructive trust is an equitable remedy to prevent unjust enrichment in the absence of any express or implied intention to form a trust."); See also *CFTC v. Heritage Capital*, 823 F.2d 171 (7th Cir. 1987) (there must be some wrongdoing on the part of legal owner for a constructive trust to be imposed).

III. PATRICIA KIMSEY OBJECTION

The Fifth Plan of Distribution would return a greater percentage to investors because a claim on behalf of an entity named Ticonderoga Leasing (Ticonderoga) is

included in the Fourth Plan, but is not included in the Fifth Plan. The Ticonderoga claim issue is the subject of Patricia Kimsey's Objection to the Fifth Plan of Distribution.

Patricia Kimsey has two claims. The first is her claim for distribution based on the \$156,700 that she and her husband, Dale Kimsey, paid directly to Birma. The payments were by several checks and wire transfers between August 11, 1998 and May 31, 2000. (Ex. F). Ms. Kimsey made a claim based on that amount, and only that amount, when she filled out the Customer Survey and sent it to the CFTC. Ex. D. She did not, however, list any of the payments she received from Birma on her Customer Survey, but those distributions are accounted for in the Plans of Distribution. The \$156,700 claim is included as the basis for distributions under the Fourth and the Fifth Plans of Distribution and is not the subject of Ms. Kimsey's Objection to those Plans. Instead, her Objection covers only the issue of the Ticonderoga claim.

Ms. Kimsey bases her claim to Ticonderoga's funds on a different investment of \$350,000, in a single check, to an entity known as ILM, on June 24, 1998. According to the CFTC and Ms. Kimsey, ILM was another investment program. Its principal is Ned Hart. Ned Hart is currently serving a prison term for securities fraud in connection with ILM.

ILM was an investment company that transferred money into a different company called Ticonderoga Leasing. According to Ms. Kimsey, Ned Hart controlled Ticonderoga. According to Ned Hart, another individual controlled Ticonderoga. Ex. C, p. 47. Ms. Kimsey concedes that the CFTC is correct that the transfers from ILM to Ticonderoga were on three dates: two dates were before Ms. Kimsey invested in ILM and one was on a date

after she invested. Ticonderoga then paid \$269,985 to defendant Stephen Brockbank personally. According to the deposition testimony of Ned Hart, now in federal prison, he arranged for Ticonderoga to pay the money to Brockbank as compensation for Mr. Brockbank's having taught Mr. Hart a commodities program and "trading methods" for six months. Ex. C. pg. 46.

It is undisputed that Birma did not prepare investor statements for Ticonderoga as it did for other investors. However, according the CFTC and defendant Brockbank, he co-mingled the money from Ticonderoga with that of the investors in Birma.

Ms. Kimsey objects to the Fourth and Fifth Plans because they do not allocate all of the money received from Ticonderoga as an investment in Birma in her name. According to Ms. Kimsey, she invested \$350,000 in ILM , which was controlled by Ned Hart, who also controlled the NRH Group, who gave the money to Brockbank.

The CFTC and several of the investors argue that there is insufficient evidence to trace Ms. Kimsey's money through two separate pools of co-mingled funds (ILM and Ticonderoga) in order to substantiate her claim that somehow the money transferred from ILM to Ticonderoga to Brockbank and then to Birma is her money. Especially when two of the transfers from ILM to Ticonderoga were before Ms. Kimsey had any funds in ILM. Further, and more important, ILM and Ticonderoga had many other investors in addition to Ms. Kimsey. There is no evidence that Ms. Kimsey is authorized to make a claim on behalf of the entire pool of investors in either ILM or Ticonderoga.

The CFTC contends that if Ticonderoga funds are to be considered an investment, rather than a payment to Mr. Brockbank personally, that the distribution should be paid to an entity on behalf of all of the investors in ILM and Ticonderoga, rather than to a single claimant in this case. Such an entity has not yet been appointed, but the CFTC represents that the SEC is expected to set up a procedure for dealing with the claims of the investors in those entities.

The court finds that Patricia Kimsey has not produced evidence that the money from Ticonderoga should be treated as an investment in her name. At most, she has shown that she is entitled to assert a claim to any distribution to be made on behalf of the entire pool of investors in ILM, which, in turn, may claim an interest in any funds from this case to be distributed on behalf of Ticonderoga. The court further finds that, on the current record, it is not possible to determine how much of the Ticonderoga money should be allocated as an "investment" by Ticonderoga in Burma and how much should be allocated as defendant Brockbank's professional fees. Accordingly, the court directed at the hearing that, within one week, defendant Brockbank submit to the CFTC any information he has that is relevant to such an allocation. The CFTC then has a week to comment on that information and send it, together with its comments, to the other claimants. Thereafter, the other claimants have one week to file any additional material with the court. The court will then rule on the allocation.

The amount of that allocation will determine the amount, if any, of the interim distribution on behalf of Ticonderoga. Because that amount may be different than that set

forth in either the Fourth or the Fifth Plans, a modification in the percentage of distribution in the form of Sixth Plan may be required. The CFTC will also be directed to hold any distribution to be made on behalf of Ticonderoga until distribution may be made to an entity on behalf of all of Ticonderoga's investors and creditors, including ILM.

IV. CONCLUSION AND ORDER

The court finds that all matters necessary for approval of an Interim Plan of Distribution are resolved except for the one issue of the allocation of the percentage, if any, of distribution on behalf of Ticonderoga. Based upon the foregoing, it is therefore

ORDERED that Deanna Garrett's Objection to the Interim Plans of Distribution is sustained and the \$100,000 claim of Deanna Garrett is her separate property and distribution thereon shall be made under her separate name and shall not be held in constructive trust for the creditors of John Garrett. It is further


ORDERED that Patricia Kimsey's Objection to the Interim Plans of Distribution is overruled and the court finds that she has not established that any funds from Ticonderoga Leasing should be treated as her investment in Birma. It is further

ORDERED that any distribution to be made on behalf of any funds invested in Birma by Ticonderoga Leasing shall be held by the CFTC until it can make distribution to an entity representing all persons with claims against Ticonderoga Leasing. It is further

ORDERED that the CFTC's Motion for Interim Distribution Plan is GRANTED and the form of the Interim Distribution Plan shall be determined by the percentage, if any, to be allocated on behalf of Ticonderoga. Following submission of materials by defendant Brockbank, Plaintiff CFTC and any investor comment, the court will issue a written order on the Ticonderoga claim.

DATED this 25th day of March, 2004.

BY THE COURT:



TED STEWART
United States District Judge

United States District Court
for the
District of Utah
March 25, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:00-cv-00622

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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